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November 12, 2013

Members of the House Commerce Committee

Re: House Bill 4366

I serve on the Leadership Counsel of the NFIB Michigan and have been asked by Amanda Fisher, Assistant State Director, to provide my perspective on House Bill 4366, which would prohibit Michigan employers from asking job applicants about their felony convictions. As you know, I have been representing the interests of business and management exclusively since 1988 in labor and employment law so I have plenty of hands-on, practical experience on this topic. Like most employers, my clients are frustrated by what seems to be a never-ending regulation of the workplace. Long gone are the days that employers could simply focus on producing the best product or service at the most competitive price. Today, employers must spend nearly as much time on risk management and keeping up with the myriad of laws that complicate the manner in which they manage their workforce. Of course, employers do know with certainty that once an individual becomes employed, the protections for that individual and the harm he or she can do at work expand exponentially. So, keeping problems from entering the workforce in the first instance is an extremely important goal, which can only be accomplished through a reasonable screening process. "Ban the box" legislation will make the screening process more difficult and costly.

As it stands right now, all but the smallest employers cannot automatically exclude applicants because of a felony conviction whether they ask the question on the application or not. Indeed, the EEOC rejects per se exclusions for felony convictions, let alone misdemeanor convictions. According to the EEOC, employers should conduct a "job relatedness" analysis, which focuses on the nature of the job, the nature and gravity of the crime and when it occurred. *EEOC April 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions.* So, for example, if the applicant checks "yes" in the box that he had a felony conviction, the employer must investigate by finding out when the conviction occurred, what the conviction was and any other relevant information. An employer looking to fill an assembly line job is not likely to pass muster under this analysis if the applicant was convicted for a felonious assault occurring at a tavern 20 years earlier. But an employer seeking a clerk to run the cash register should be concerned about a recent theft or embezzlement conviction.

Without the benefit of this information, employers are in essence forced to spend money conducting criminal background investigations. While many of my clients do conduct such investigations, not all do. There are still plenty of small businesses that cannot afford to conduct comprehensive criminal background checks and the cost of compliance with the Fair Credit Reporting Act requirements. A 'ban the box" law would force most of these small businesses to incur that cost to identify applicants with felony convictions. Criminal background checks are not risk-free and have their limitations. Accessing the criminal LIEN sheet at the local courthouse can lead to liability because the LIEN sheet will contain arrests that did not result in convictions, which is prohibited under the *Elliott Larsen Civil Rights Act.* MCLA 37.2205a. Employers can use the Michigan Department of Corrections Offender Tracking Information System ("OTIS") to learn about offenders previously or currently under the jurisdiction or supervision of the MDOC. However, if more than three years have passed since the offender was last in the MDOC system, the employer will not learn of the information through OTIS. Another source for employers is the Internet Criminal History Access Tool ("ICHAT"), which allows a search of public

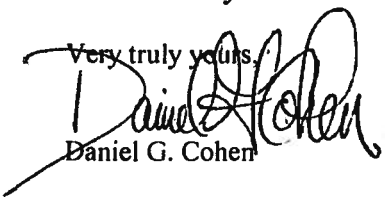
records contained in the Michigan Criminal History Record maintained by the Michigan State Policy, Criminal Justice Information Center. This source does not include federal records or criminal history information from other states. And, an ICHAT search requires the date of birth of the individual, which cannot lawfully be requested during the application process. Thus, neither OTIS nor ICHAT provide employers with the solace that they are accessing all of the necessary information.

There is a "middle ground" which protects employer and employee interests while preserving the hope of a second chance for many convicted felons. Many states have adopted laws that prohibit employers from asking about convictions that have been expunged. This certainly takes the onus off the employer and places it squarely where it belongs: on the convicted felon. I, for one, sympathize with the individual who made a mistake when he/she was "young and dumb." So, let that individual go through the process of expunging the crime from his/her record. Crimes that can be expunged tend not to be those that cause employers and employees the most concern. They tend not to be crimes that will land an individual on the registered sex offender list, for example. These are the criminals that you and I have a right not to have to work next to. They are the ones who should not be given a "leg up" on all the law-abiding citizens, whose good behavior and good judgment is minimized, and actually punished by an uncompromising "ban the box" law.

Allow me to make this final point: Every new civil rights statute, regardless of whether it protects race, ethnicity, age, disability, etc. empowers terminated employees to strike back at employers. Inevitably, because employers don't often run off good employees, that group is statistically more likely to be made up of individuals who do not follow rules at work resulting in their separation. That disregard for work rules translates into a disregard for the rules that require parties to tell the truth and an astonishingly high number of cases where plaintiffs color the truth or outright lie in order to fashion a case. The unfortunate truths in 2013 are: 1) that we have too many underemployed lawyers and there is no financial disincentive to pass up those falsified cases and 2) that the system does not sanction individuals who lie to sue their employers. Now, the legislature is thinking of empowering a group with an established history of dishonesty and unleashing them upon honest people struggling to maintain a business. It is exceedingly naïve to think that convicted applicants won't lie and testify that they were asked verbally whether they had a conviction in phone calls and interviews, in order to make a case and hit the litigation lottery.

Should you have any additional questions or wish to discuss the above comments, please do not hesitate to contact me at your convenience.

Very truly yours,



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